Supreme Court, U.S.
FILED
SEP 15 2000
CLERK

No. 99-804

IN THE

Supreme Court of the United States

CARL W. CLEVELAND,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

ROBERT B. BARNETT
PAUL MOGIN*
JOSEPH G. PETROSINELLI

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Attorneys for Petitioner Carl W. Cleveland

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

39pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ARGUMENT IN REPLY	1
I. THE FIRST QUESTION BRIEFED BY THE GOVERNMENT WAS NOT RAISED OR DECIDED BELOW, NOR MENTIONED IN THE GOVERNMENT'S OPPOSITION TO CERTIORARI	1
II. THE MAIL FRAUD STATUTE IS LIMITED TO SCHEMES TO DEPRIVE ANOTHER OF MONEY, PROPERTY, OR THE RIGHT OF HONEST SERVICES	4
A. *McNally* Held, and *Carpenter* Reaffirmed, That the Mail Fraud Statute Is Limited to the Protection of Property Rights.	4
B. *McNally* Construed the Statute, Not Just a Single Phrase	5
C. There Is No Justification for Revisiting the Question of Statutory Interpretation Decided in *McNally*	9
D. The Government Has Not Shown That the Mail Fraud Statute Reaches Beyond the Protection of Money, Property, and the Right of Honest Services.	10
III. THE STATE OF LOUISIANA WAS NOT DEPRIVED OF PROPERTY	15
A. The State Has No Property Interest in Video Poker Licenses Before They Are Issued.	16

TABLE OF CONTENTS—Continued

Page

B. The State Has No Property Interest in the Licenses After They Are Issued 20

C. Video Poker Licenses Are Not Comparable to Cable Television Franchises or Other Government Franchises 24

D. The Limited Scope of Congress's Response to *McNally* Supports Reversal..... 27

CONCLUSION 28

ADDENDUM 1a

TABLE OF AUTHORITIES

Cases: Page

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) 12
Association of Mexican-American Educators v. California, 195 F.3d 465 (9th Cir. 1999) 18
Bob Jones University v. United States, 461 U.S. 574 (1983) 12
Borre v. United States, 940 F.2d 215 (7th Cir. 1991) 25, 26, 27
Bouie v. City of Columbia, 378 U.S. 347 (1964) ... 9
CFTC v. Schor, 478 U.S. 833 (1986) 27
Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 17
Carpenter v. United States, 484 U.S. 24 (1987) ..... 4, *passim*
College Savings Bank v. Fl. Prepaid Post-secondary Educ. Expense Bd., 527 U.S. 666 (1999) 19, 24
Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) 3
Demarest v. Manspeaker, 498 U.S. 184 (1991) 2
Douglas v. Kentucky, 168 U.S. 488 (1897) 25
Dunmar Investment Co. v. N. Natural Gas Co., 185 Neb. 400, 176 N.W.2d 4 (1970) 24
Durland v. United States, 161 U.S. 306 (1896) 14
Goodwill Adver. Co. v. State Liquor Auth., 244 N.Y.S.2d 322 (N.Y. Sup. Ct. 1962), *aff'd on the trial court op.*, 244 N.Y.S.2d 640 (N.Y. App. Div. 1963) 18
Griffin v. United States, 502 U.S. 46 (1991) 22
Guillot v. La. Gaming Control Board, 761 So. 2d 561 (La. Ct. App. 1999) 17
Hilton v. S.C. Public Railways Commission, 502 U.S. 197 (1991) 9
Howlett v. Rose, 496 U.S. 356 (1990) 1

TABLE OF AUTHORITIES—Continued

Page

Lindahl v. Office of Personnel Management, 470 U.S. 768 (1985) 27
Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990) 2
Marks v. United States, 430 U.S. 188 (1977) 9
Matsushita Electric Industrial Co. v. Epstein, 516 U.S. 367 (1996) 2
McBoyle v. United States, 283 U.S. 25 (1931) 14
McNally v. United States, 483 U.S. 350 (1987). 4, *passim*
Neder v. United States, 527 U.S. 1 (1999) 4, 8, 10
Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994) 3
Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 2
Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995) 1
Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 9
People v. Tompkins, 186 N.Y. 413, 79 N.E. 326 (1906) 9
Pierce v. United States, 314 U.S. 306 (1941) 23
Polk v. Edwards, 626 So. 2d 1128 (La. 1993) 19
Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 12
Sahuque Realty Co. v. Employers Commercial Union Insurance Co. of America, 327 So. 2d 563 (La. App. 1976) 18
Schreiber v. Burlington N., Inc., 472 U.S. 1 (1985) 12
Semiconductor Energy Laboratories Co. v. Samsung Electronics Co., 204 F.3d 1368 (Fed. Cir. 2000), *petitions for cert. filed*, U.S.L.W. 3110 (July 21 and 25, 2000) (Nos. 00-127, 00-138) 11, 19
Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967) 24

TABLE OF AUTHORITIES—Continued

Page

South Central Bell Telephone Co. v. Alabama, 526 U.S. 160 (1999) 2
Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996) 26, 27
United States v. Adler, 186 F.3d 574 (4th Cir. 1999) 11
United States v. Bailey, 516 U.S. 137 (1995) 28
United States v. Baldinger, 838 F.2d 176 (6th Cir. 1988) 11
United States v. Bucuvalas, 970 F.2d 937 (1st Cir. 1992) 21
United States v. F.J. Vollmer & Co., 1 F.3d 1511 (7th Cir. 1993) 11
United States v. Goodrich, 871 F.2d 1011 (11th Cir. 1989) 11
United States v. Granberry, 908 F.2d 278 (8th Cir. 1990) 11
United States v. Guadagna, 183 F.3d 122 (2d Cir. 1999) 11
United States v. Henry, 29 F.3d 112 (3d Cir. 1994) 11
United States v. Italiano, 894 F.2d 1280 (11th Cir. 1990) 26
United States v. Kenrick, 221 F.3d 19 (1st Cir. 2000) 11
United States v. Kristofic, 847 F.2d 1295 (7th Cir. 1988) 24
United States v. Martinez, 905 F.2d 709 (3d Cir. 1990) 2, 11
United States v. Miller, 997 F.2d 1010 (2d Cir. 1993) 11
United States v. Ochs, 842 F.2d 515 (1st Cir. 1988) 11

TABLE OF AUTHORITIES—Continued

Page

United States v. Perholtz, 836 F.2d 554 (D.C. Cir. 1987) 11
United States v. Runnels, 877 F.2d 481 (6th Cir. 1989) 6
United States v. Salvatore, 110 F.3d 1131 (5th Cir. 1997) 2, 15, 16
United States v. Schwartz, 924 F.2d 410 (2d Cir. 1991) 18
United States v. Shelton, 848 F.2d 1485 (10th Cir. 1988) 11
United States v. Slay, 717 F. Supp. 689 (E.D. Mo. 1989) 24, 25
United States v. Stouffer, 986 F.2d 916 (5th Cir. 1993) 11
United States v. Walgren, 885 F.2d 1417 (9th Cir. 1989) 11
White Top Cab Co. v. City of Houston, 440 S.W.2d 732 (Tex. Civ. App 1969, no writ) 24
Yee v. City of Escondido, 503 U.S. 519 (1992) 2, 3
Yellow Cab Co. v. City of Chicago, 186 F.2d 946 (7th Cir. 1951) 18

Statutes:

Act of June 4, 1897, 30 Stat. 11 12
Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130 13
Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460 (1992) 26
La. Rev. Stat. Ann. § 27:306(D) (formerly La. Rev. Stat. Ann. § 33:4862.6(D) (West Supp. 1996)) 21, 22
La. Rev. Stat. Ann. § 27:306(E) 22

TABLE OF AUTHORITIES—Continued

Page

La. Rev. Stat. Ann. § 33:4862.1(D) (West Supp. 1996) (current version at La. Rev. Stat. Ann. § 27:301(D)) 25
La. Rev. Stat. Ann. § 33:4862.6(A)(1) (West Supp. 1996) (current version at La. Rev. Stat. Ann. § 27:306(A)(1)) 18
La. Rev. Stat. Ann. § 33:4861.6(A)(4)(a) (West Supp. 1996) (current version at La. Rev. Stat. Ann. § 27:306(A)(4)(a)) 26
La. Rev. Stat. Ann. § 33:4862.11(G) (West Supp. 1996) (current version at La. Rev. Stat. Ann § 27:311(G)) 21
Mass. Gen Laws Ann. ch. 138, § 23 (West 1991) . 22
18 U.S.C. § 1341 ..... 2, *passim*
42 U.S.C. § 1983 2

Regulations:

La. Admin. Code, tit. 55, § 2405(A)(6) (1992) 23
La. Admin. Code, tit. 55, § 2405(A)(7) (1992) 18
La. Admin. Code, tit. 55, § 2415(A)(1)(e)(i) (1992) 26

Reports:

H. R. Rep. No. 60-2 (1908) 13
Report of the Commission To Revise and Codify the Criminal and Penal Laws of the United States, S. Doc. No. 57-68 (1901) 13, 14
S. Rep. No. 60-10 (1908) 13

Miscellaneous:

Cong. Globe, 41st Cong., 3d Sess. (1870) 10
42 Cong. Rec. 589 (1908) 14
Michael R. Dreeben, *Insider Trading and Intangible Rights: The Redefinition of the Mail Fraud Statute*, 26 AM. CRIM. L. REV. 181 (1988) . 7

TABLE OF AUTHORITIES—Continued

Page

Louisiana Legislative Fiscal Office, State Gaming Revenue-Sources and Uses (Dec. 20, 1999) 26

Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) 15

I. THE FIRST QUESTION BRIEFED BY THE GOVERNMENT WAS NOT RAISED OR DECIDED BELOW, NOR MENTIONED IN THE GOVERNMENT'S OPPOSITION TO CERTIORARI.

The Court's grant of certiorari in this case was "limited to Question 1 as presented by the petition." 120 S. Ct. 1416 (2000). That question reads: "Can alleged false statements or omissions in applications for state licenses be the basis for federal mail or wire fraud charges, on the theory that a license that has not yet been issued constitutes 'property' of the State, of which State is deprived when it issues the license?" Pet. Cert. i.[1] Petitioner's opening brief and the briefs of *amici curiae* are directed to that question.

The Government would now have the Court address an entirely different question: Does the mail fraud statute allow a conviction without proof of a scheme aimed at depriving another of money, property, or the right of honest services? *See* U.S. Br. 6-7, 10-27. This question was nowhere mentioned in the Government's brief in opposition to the petition for certiorari, and the Government never raised the issue in the courts below. The Government nonetheless urges this Court to address the issue, to hold that no intended deprivation of money, property, or the right of honest services is required, and to affirm on this alternate ground without reaching the question on which certiorari was granted. The Government's belated attempt to inject a new question into the case is contrary to the well-established practices of this Court. *See, e.g., Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457 (1995) ("As a court of review, not one of first view, we will entertain issues withheld until merits briefing 'only in the most exceptional cases.'" (quoting *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992)).

Although the Court has the power to consider an issue first presented to it in a respondent's merits brief, with rare exception the Court has declined to exercise that power. For exam-

---

[1] Petitioner also had sought certiorari on a question relating to the absence of an instruction to the jury that materiality is an element of mail fraud.

ple, in *Howlett v. Rose*, 496 U.S. 356 (1990), the Court had granted certiorari to decide whether a state-law defense of sovereign immunity was available to a school board otherwise subject to suit in a Florida court even though such a defense would have been unavailable in federal court. Respondents then argued in their brief on the merits that the school board was an arm of the State and thus not a "person" under 42 U.S.C. § 1983. 496 U.S. at 381 n.24. Because the contention had not been presented in respondents' brief in opposition to certiorari, this Court declined to address it. *See id. See also, e.g., South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 171 (1999); *Okla. City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

It is also the settled practice of this Court not to consider questions which were not fully litigated and decided in the lower courts. For example, in *Yee v. City of Escondido*, the Court declined to address an issue not raised below because "Prudence . . . dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." 503 U.S. at 538. *See also, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996); *Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990). The Government never contended in either the District Court or the Court of Appeals that § 1341 reaches schemes which do not have as their object a deprivation of money, property, or the right of honest services.[2]

---

[2] The Government notes that in the District Court it cited *United States v. Martinez*, 905 F.2d 709 (3d Cir. 1990), which asserts that § 1341 "is broad enough to cover a scheme to defraud a victim of something that takes on value only in the hands of the acquirer." 905 F.2d at 713. But the Government cited *Martinez*, not for that proposition, but as support for resolving in the Government's favor "the question of whether governmental licenses are property under § 1341." R. 615-16. *See also* R. 614 ("A reading of the indictment shows that it sufficiently alleges deprivation of property."). Although the Government seeks to explain its failure to raise its new claim in the Court of Appeals by pointing to that court's prior decision in *United States v. Salvatore*, 110 F.3d 1131 (5th Cir. 1997), the

The decisions relied upon by the Government (*see* U.S. Br. 19 n.9) do not support its effort to have this Court decide an entirely new question. In *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), the Court did not decide a question first raised in a respondent's merits brief. The respondents had contended in the Court of Appeals that additional constitutional violations should have been found by the District Court, but the Court of Appeals had not addressed that contention. Stressing "the confusion at various stages in this case . . . as to the applicable principles and appropriate relief," this Court made clear that the claim of additional violations should be considered on remand. *Id.* at 419. Here, in contrast, the Government raises a contention it never presented to the lower courts.

The language the Government quotes from *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994), is taken out of context. The full sentence reads: "A prevailing party *need not cross-petition* to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment." *Id.* at 364 (emphasis added). *Northwest Airlines* merely indicates that the Government was not required to file a cross-petition – not that the Court should consider a claim the Government never raised in the lower courts or in its brief in opposition to certiorari.

Although the Court has addressed issues beyond the scope of the questions presented "in the most exceptional cases," *Yee*, 503 U.S. at 535, this is not such a case. There is not even a conflict among the circuits on the question the Government seeks to raise. Every circuit has concluded that the mail fraud statute reaches only schemes aimed at depriving another of money, property, or honest services. *See* pp. 10-11, *infra*. This case should be decided based on the question on which certiorari was granted.

Government likewise did not raise the claim in its brief in *Salvatore* but instead argued that the charges there "described property loss." *See* U.S. Br. in *Salvatore* at 23, 51-55 (5th Cir.) (No. 96-30221).

II. THE MAIL FRAUD STATUTE IS LIMITED TO SCHEMES TO DEPRIVE ANOTHER OF MONEY, PROPERTY, OR THE RIGHT OF HONEST SERVICES.

Even if the Government's new claim is entertained, it should be rejected. The claim is foreclosed by *McNally v. United States*, 483 U.S. 350 (1987), and *Carpenter v. United States*, 484 U.S. 19 (1987). Indeed, just last year, in its brief in *Neder v. United States*, 527 U S. 1 (1999), the Government told this Court that the mail fraud statute is limited to schemes intended to defraud a victim or to obtain money or property from the victim. *See* p. 10, *infra*. There is no justification for revisiting *McNally* and *Carpenter*. Even if there were, the Government's claim is without merit.

A. *McNally* Held, and *Carpenter* Reaffirmed, That the Mail Fraud Statute Is Limited to the Protection of Property Rights.

The Government's contention is contrary to the holding of *McNally*, which was restated and applied in *Carpenter*. In *McNally* the Court analyzed the mail fraud statute, its legislative history, and precedent, and then announced the following holding: "we read § 1341 as limited in scope to *the protection of property rights*. If Congress desires to go further, it must speak more clearly than it has." 483 U.S. at 360 (emphasis added).[3] In *Carpenter* the Court specifically stated: "*We held in McNally* that the mail fraud statute does not reach 'schemes to defraud citizens of their intangible rights to honest and impartial government,' and *that the statute is 'limited in scope to the protection of property rights.*'" 484 U.S. at 25

---

[3] *See also id.* at 359 n.8 ("the mail fraud statute, as we have indicated, had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute *must be limited to the Government's interests as property holder*" (emphasis added)), 356 ("the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property"), 356 ("The mail fraud statute clearly protects property rights . . . ."), 357 (1909 amendment "gave further indication that the statute's purpose is protecting property rights").

(quoting *McNally*, 483 U.S. at 355, 360) (citation omitted) (emphasis added).[4] The Court upheld the mail and wire fraud convictions at issue in *Carpenter* only after concluding that the defendants had participated in a scheme aimed at depriving the Wall Street Journal of property. *See Carpenter*, 484 U.S. at 25-28.

In short, *McNally* held, and *Carpenter* reaffirmed, that § 1341 is limited to protecting property rights. The position advanced by the Government here is tantamount to a request that the Court overrule *McNally*.

B. *McNally* Construed the Statute, Not Just a Single Phrase.

The Government asserts that *McNally* was concerned only with the phrase "any scheme or artifice to defraud" (which dates back to the original mail fraud statute) and did not construe the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" (which was added to the statute in 1909 as part of the revision and codification of federal criminal laws). According to the Government, the addition of the second phrase in 1909 extended the statute to conduct not aimed at depriving anyone of money or property. U.S. Br. 10, 11. In *McNally*, however, the Court specifically considered and rejected the argument that the two phrases should be interpreted independently. The Court interpreted the second phrase as merely confirming that the statute proscribes false promises and representations as to the future as well as other frauds involving money or property. Contrary to the Government's contention here, *McNally* establishes that the two phrases do not define independent grounds of liability.

---

[4] *See also Carpenter*, 484 U.S. at 25 ("Petitioners assert that . . . they did not obtain any 'money or property' from the Journal, which is a necessary element of the crime under our decision last Term in *McNally* . . . ." (footnote omitted)), 27 ("Sections 1341 and 1343 reach any scheme *to deprive another* of money or property by means of false or fraudulent pretenses, representations, or promises." (emphasis added)).

1. The Government stresses that in *McNally* "The Court observed that '[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently.'" U.S. Br. 14 (quoting 483 U.S. at 358). But in the very next paragraph of the opinion, the Court specifically resolved that "arguable" question against the Government, concluding that the second phrase merely clarifies the first:

> As the Court long ago stated, however, the words "to defraud" commonly refer "to wronging one in his property rights by dishonest methods or schemes," and "usually signify the deprivation of something of value by trick, deceit, chicane or overreaching." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). The codification of the holding in *Durland* [*v. United States*, 161 U.S. 306 (1896),] in 1909 does not indicate that Congress was departing from this common understanding. *As we see it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.*

McNally, 483 U.S. at 358-59 (footnote omitted) (emphasis added).

Accordingly, when the *McNally* Court thereafter stated the holding of the case, the Court did not limit it to the first phrase but instead applied it to the statute as a whole: "we read *§ 1341* as limited in scope to the protection of property rights." *Id.* at 360 (emphasis added). *See also id.* at 359 n.8 ("*the mail fraud statute*, as we have indicated, had its origin in the desire to protect individual property rights, and any benefit which the Government derives from *the statute* must be limited to the Government's interests as property holder" (emphasis added)).[5]

---

[5] Certainly courts and commentators have understood *McNally* to address the statute as a whole, not just the first phrase. *See, e.g., United States v. Runnels*, 877 F.2d 481, 490 (6th Cir. 1989) (en banc) ("in *McNally* the Supreme Court specifically rejected the notion that the con-

The Government's central argument is that the "or" separating the first two phrases of the statute indicates that the phrases should be interpreted as defining independent schemes punishable as mail fraud. *McNally* squarely rejected that argument.

2. An examination of the facts of *McNally* confirms that the decision is not limited to the first phrase. The indictment and jury instructions were based on the second phrase as well as the first. As the Court explained, the mail fraud count "alleged that petitioners had devised a scheme (1) to defraud the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly, and (2) *to obtain, directly and indirectly, money and other things of value by means of false pretenses and the concealment of material facts.*" *Id.* at 353-54 (emphasis added). Similarly, the jury instructions were based on both phrases. *See id.* at 355.

If the Government were correct that the Court intended to hold only that the first phrase of § 1341 requires a deprivation of money or property, the Court surely would have separately addressed the question whether the convictions could stand under the second phrase. The Court did not do so. Instead, the Court simply reversed the convictions because the jury was not required to find a deprivation of money or property.[6]

---

cept of 'defrauding' or 'obtaining money by false pretenses,' although phrased in the disjunctive, represented two different types of charges"); Michael R. Dreeben, *Insider Trading and Intangible Rights: The Redefinition of the Mail Fraud Statute*, 26 AM. CRIM. L. REV. 181, 192 (1988) ("the Court concluded that mail fraud must involve a wrong to money or property rights").

[6] *See McNally*, 483 U.S. at 360 ("there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property. It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance. Hunt and Gray received part of the commissions but those commissions were not the Commonwealth's money.").

Citing page 361 of *McNally*, the Government asserts that the Court "declined to address the applicability of the second clause because the jury instructions did not require a finding that the defendants obtained property by fraudulent means." U.S. Br. 13. The Government has mis-

That the Court dealt with the jury instructions on mail fraud *en masse*, rather than separately addressing the first and second phrases, is confirmation that the Court intended its holding to apply to both phrases.

3. Decisions of this Court subsequent to *McNally* also refute this Government's attempt to confine that decision to the first phrase of the statute. *Carpenter* treated *McNally's* holding as applicable to the mail fraud statute, not just the first phrase. *See* 484 U.S. at 25, 27. Similarly, *McNally's* rejection of the notion that the two phrases establish independent bases of liability was an implicit premise of the Court's decision in *Neder*. In *Neder* the Court held that, because the term "defraud" required proof of materiality at common law, and statutory terms with a well-known meaning at common law are presumed to incorporate that meaning, materiality of falsehood is an element of mail fraud. 527 U.S. at 21-25. Had the Court considered it an open question whether the second phrase of the statute creates a separate ground of liability, it would have been necessary for the Court separately to address whether that phrase also requires materiality. The Court did not do so but instead construed the entire mail fraud statute. *Id.* at 25.

---

read the Court's opinion. The comment at page 361 addresses only *one* of the alternative means by which, according to the Government's brief in *McNally*, the defendants had schemed to obtain property – *i.e.*, "by means of false representations to [the insurance company] Wombwell." *McNally*, 483 U.S. at 361. In light of the jury instructions, the Court held that the jury had not been required to find that the defendants engaged in a scheme to deprive Wombwell of its property. But the Government also had argued, and the Court agreed, that the defendants obtained insurance commissions through false pretenses and the concealment of material facts from the Commonwealth. *See* U.S. Br. in *McNally* at 18-19; *McNally*, 483 U.S. at 360. If the Court had considered its holding about property rights to be confined to the first phrase of § 1341, the Court would not have reversed the convictions without providing some other explanation for why obtaining the insurance commissions did not violate the statute.

C. There Is No Justification for Revisiting the Question of Statutory Interpretation Decided in *McNally*.

The Government's contention that § 1341 reaches schemes which only seek to obtain property is thus directly contrary to the holding of *McNally*, which was reaffirmed in *Carpenter*. The interpretation adopted in those decisions was correct. *See* Part II.D, *infra*. Moreover, as a well-established statutory interpretation, it should not be revisited.

The Government is asking this Court to overrule *McNally*, to adopt a new interpretation that is contrary to the law in every circuit, *see* pp. 10-11, *infra*, and to apply it to conduct occurring in 1994 and 1995. That result is precluded by the due process prohibition against retroactive application of an unforeseeable construction of a criminal statute. *See*, *e.g.*, *Marks v. United States*, 430 U.S. 188, 195-96 (1977); *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964); *People v. Tompkins*, 186 N.Y. 413, 416, 79 N.E. 326, 327 (1906). "The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d ed. 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures." *Bouie*, 378 U.S. at 354. In 1994 and 1995, it certainly was not the law that § 1341 applied to efforts to obtain property without depriving anyone of property.

Even apart from constitutional limitations, the doctrine of *stare decisis* calls for adherence to *McNally* and *Carpenter*. Where "a pure question of statutory construction" is involved, "the doctrine of *stare decisis* is most compelling." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 205 (1991). "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). The Court declared in *McNally*: "If Congress desires to go further, it must speak more clearly than it has." 483 U.S. at 360. In response, Congress did decide to go further, but only

by extending the statute to schemes aimed at depriving another of the right of honest services. *See* Pet. Br. 14.

D. The Government Has Not Shown That the Mail Fraud Statute Reaches Beyond the Protection of Money, Property, and the Right of Honest Services.

For many reasons, the Government's contention should be rejected even if the Court were willing to re-examine the correctness of *McNally* and *Carpenter*.

1. As recently as last year, the Government advanced an interpretation of the mail fraud statute that is contrary to the interpretation it now asks the Court to embrace. In its brief in *Neder*, the Government argued that the elements of the mail, wire, and bank fraud statutes "limit the scope of the statutes to schemes that the defendant subjectively intends would defraud a victim or would enable the defendant to obtain money or property from the victim." U.S. Br. in *Neder* at 44. *See also id* at 40 (arguing that the "essence" of mail, wire, and bank fraud "is the intent to defraud, and a person thus cannot commit those crimes without at least intending that his fraudulent scheme cause the victim to part with money, property, or some other interest"). The Government offers no explanation for its abrupt change in position.

2. As the Court noted in *McNally*, "the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." 483 U.S. at 356. *See* Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (statement of Rep. Farnsworth) (explaining recodification that included the mail fraud statute as necessary "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country").

3. All the courts of appeals construe the mail fraud statute to require a scheme to deprive another of money, property, or the right of honest services. *See, e.g.*, *United States v. Kenrick*, 221 F.3d 19 (1st Cir. 2000); *United States v. Ochs*, 842 F.2d 515, 521-27 (1st Cir. 1988); *United States v.*

Guadagna, 183 F.3d 122, 129 (2d Cir. 1999); *United States v. Miller*, 997 F.2d 1010, 1016 (2d Cir. 1993); *United States v. Henry*, 29 F.3d 112, 113-16 (3d Cir. 1994); *United States v. Adler*, 186 F.3d 574, 576 (4th Cir. 1999); *United States v. Stouffer*, 986 F.2d 916, 922 (5th Cir. 1993); *United States v. Baldinger*, 838 F.2d 176, 179 (6th Cir. 1988); *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1520 (7th Cir. 1993); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990); *United States v. Walgren*, 885 F.2d 1417, 1423-24 (9th Cir. 1989); *United States v. Shelton*, 848 F.2d 1485, 1495-96 (10th Cir. 1988); *United States v. Goodrich*, 871 F.2d 1011, 1013 (11th Cir. 1989); *United States v. Perholtz*, 836 F.2d 554, 557-58 (D.C. Cir. 1987); *Semiconductor Energy Lab. Co. v. Samsung Elecs. Co.*, 204 F.3d 1368, 1380 (Fed. Cir. 2000), *petitions for cert. filed*, 69 U.S.L.W. 3110 (July 21 and 25, 2000) (Nos. 00-127, 00-138).

In *United States v. Martinez*, 905 F.2d 709 (3d Cir. 1990), upon which the Government relies, *see* U.S. Br. 12, the Third Circuit only briefly discussed whether § 1341 is limited to schemes to deprive a victim of property. 905 F.2d at 713. The court did not come to any firm conclusion and instead decided the case on the ground that the Commonwealth of Pennsylvania had been deprived of property. *Id.* at 714-15. The Third Circuit subsequently has held that conduct which only seeks to obtain money or property, without depriving anyone of money or property, is not punishable under the mail or wire fraud statutes. In *United States v. Henry*, the court affirmed the dismissal of wire fraud charges because the alleged scheme had not been calculated to cause a deprivation of property. 29 F.3d at 114-16. The court framed the question to be decided as whether the alleged victims of the scheme (certain banks) had been deprived of "a property right." *Id.* at 114. Finding no such deprivation, the court held the indictment deficient – even though it alleged that the participants in the scheme had obtained a substantial sum of money:

> Our determination that the fair opportunity to bid is not a property right of the competing banks seals the fate of this indictment. It is irrelevant that, as the govern-

> ment points out, the scheme allegedly afforded its participants tangible benefits–over $34,000,000 in deposits for Bank A, and favorable loan treatment and campaign contributions to his political allies for Mike. The same was true in *McNally*, but did not save the convictions there.

Id. at 116.

4. Repeating an argument it unsuccessfully made in *McNally*, *see* U.S. Br. in *McNally* at 17, the Government emphasizes that "'[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings.'" U.S. Br. 13 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). But this canon is simply one interpretive guide, and there are many instances besides *McNally* in which the Court has found it inapplicable. *See, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 585-86 (1983); *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 7-8 (1985); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380-81 (1999).[7]

5. It is apparent that the addition of the second phrase, as part of the revision and codification of federal criminal laws in 1909, was not intended to expand the statute to reach schemes not aimed at depriving anyone of money or property; and that, to the contrary, the amendment "gave further indication that the statute's purpose is protecting property rights." *McNally*, 483 U.S. at 357.

In 1897 Congress created a Commission to revise and codify the criminal and penal laws of the United States. Act of June 4, 1897, 30 Stat. 11, 58. The act constituting the Commission mandated that the Commission's report "shall be so made as to indicate any proposed change in the substance of existing law, and shall be accompanied by notes which shall

---

[7] That the second phrase does not contain the words "from another," *see* U.S. Br. 11-12, hardly demonstrates that Congress sought to extend the statute to conduct not aimed at obtaining anyone's money or property. To the extent that members of the 1909 Congress focused on the phrase, they would not likely have considered the absence of those two words significant, for fraudulent conduct inevitably involves another person.

briefly and clearly state the reasons for any proposed change." *Id.*

In 1901 the Commission presented a report to the Attorney General. *See Report of the Commission To Revise and Codify the Criminal and Penal Laws of the United States*, S. Doc. No. 57-68, Part 2 (1901). After reciting the foregoing mandate, *id.* at III, the Commission proposed a revision of the mail fraud statute. *Id.* at 63. One proposed change was the addition of the phrase "or for obtaining money or property by means of false and fraudulent pretenses, representations, or promises." *Id.* Consistent with its mandate from Congress, the Commission indicated in the part of its report concerning the mail fraud statute the proposed changes in the substance of existing law. *See id.* at XVII, reproduced in the Addendum, *infra*. No mention was made of what is now the second phrase. Given the Commission's mandate, the Commission clearly did not intend that phrase to effect a "change in the substance of existing law." 30 Stat. at 58. That is particularly so given the use of a gerund rather than an infinitive and the title the Commission chose for the revised statute it proposed: "Use of mails to promote frauds." Report, at XVII, 63.

Congress subsequently considered the Commission's Report and adopted without significant change the Commission's proposed revision of the mail fraud statute.[8] The House and the Senate reports both quote the Commission's mandate to indicate any proposed change in the substance of existing law.[9] In discussing the revision to the mail fraud statute, the reports simply state: "Aside from a transposition of language, all other changes made in this section are indicated by italics and need no further explanation."[10] Given

---

[8] Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130. The word "and" after "false" in the Commission's 1901 Report was changed to "or" in the 1909 amendments. The title "Use of mails to promote frauds" was changed to "Using mails to promote frauds."

[9] *See* H. R. Rep. No. 60-2, Part 1, at 1 (1908); S. Rep. No. 60-10, Part 1, at 1 (1908).

[10] H. R. Rep. No. 60-2, Part I, at 22; S. Rep. No. 60-10, Part 1, at 22.

Congress's familiarity with the Commission's mandate to indicate any proposed change in the substance of existing law, it is reasonable to infer that Congress understood the amendments to the mail fraud statute to change existing law only in the respects noted in the Commission's report.[11] That is particularly so given the absence of any comment in the debates in Congress or in any committee report suggesting an intent to expand the statute to reach conduct not aimed at depriving anyone of money or property. *Cf. McBoyle v. United States*, 283 U.S. 25, 26-27 (1931) (holding criminal statute inapplicable to airplanes in part because they were well known when the statute was enacted but "were not mentioned in the reports or in the debates in Congress"). The Government notes that the 1909 revision made "other significant changes in the mail fraud statute." U.S. Br. 15 n.5. But unlike the addition of the second phrase, both of the changes in the statutory text pointed to by the Government were discussed in the Commission's Report. *See* Report, at XVII.

Thus, the background of the 1909 revision fully supports this Court's conclusion in *McNally* that the addition of the second phrase "codified the holding of *Durland* [*v. United States*, 161 U.S. 306 (1896)], which was cited in the Commission's Report." *McNally*, 483 U.S. at 357. The language of the second phrase closely tracks the opinion in *Durland*. As the Court observed in *McNally*, the second phrase "is based on the statement in *Durland* that the statute reaches 'everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.'" 483 U.S. at 358 (quoting *Durland*, 161 U.S. at 313). The phrase "for obtaining money or property" was simply substituted for *Durland*'s "everything designed to defraud," *see McNally*, 483 U.S. at 358, and minor changes were made to the remainder of the sentence from *Durland*. Because the phrase merely codified *Durland*, the Commission did not regard its

---

[11] *See also* 42 Cong. Rec. 589 (1908) (remarks of Rep. Sherley) (stating that his "attitude . . . toward this work has been one against the creation of new law," and that "I found that attitude to be held by all the other members of the [Joint] [C]ommittee [on the Revision of the Laws]").

addition as a substantive change to be discussed in the Commission's Report.[12]

For all these reasons, if the Court entertains the Government's first contention, that contention should be rejected.

III. THE STATE OF LOUISIANA WAS NOT DEPRIVED OF PROPERTY.

In advancing its alternative claim that the State of Louisiana was deprived of property, the Government does not point to case law that supports the expansive notion of property adopted by the Court of Appeals. Although various kinds of licensing schemes have been utilized in a broad spectrum of areas for more than a century, *see* Pet. Br. 24-25, the Government likewise does not cite a treatise or even a law review article supporting the view that a governmental entity is deprived of property when it issues a license. This absence of supporting authority is confirmation that the Court of Appeals' decision goes beyond any established concept of property, and is contrary to *Carpenter v. United States*, 484 U.S. 24 (1987), and other decisions recognizing that traditional understandings are the benchmark in determining whether something is property for purposes of the mail fraud statute. *See id.* at 26; cases cited at Pet. Br. 32 & n.32.[13]

In its effort nevertheless to sustain petitioner's conviction and sentence, the Government offers an array of differing contentions and analogies. First, it asserts that the State "has

---

[12] In its brief in *McNally*, the Government itself recognized that the 1909 amendment "codified" *Durland*. *See* U.S. Br. in *McNally* at 25. It argues exactly the opposite here. *See* U.S. Br. 17.

[13] Both the Court of Appeals' decision in *United States v. Salvatore*, 110 F.3d 1131 (5th Cir. 1997), and the Third Circuit's decision in *Martinez* relied upon Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964), but petitioner demonstrated in his opening brief that the courts' reliance on that article was misplaced. Pet. Br. 31-33. The Government obviously does not disagree, as it makes no mention of the Reich article. Nor does the Government, in the part of its brief contending that the State was deprived of property, make any mention of the Third Circuit's reasoning in *Martinez*.

a property interest in a video poker license even before the license has been issued," U.S. Br. 32, because the State expects to collect a fee before issuance and a percentage of net revenues after issuance. According to the Government, the State "is effectively 'selling' the license to the applicant," *id.* 33, and the State's position is similar to that of a patent holder. *Id.* 33-34. Second, the State purportedly had "a property interest in the license once it had been issued," *id.* 35, because the State is "essentially in business with the licensee," *id.*, and the State "protects its interest in the business" by "extensive regulation and monitoring," *id.*, and by "retain[ing] control over whether, and in what circumstances, the license could be retained, revoked, transferred, or renewed." *Id.* 37. Third, the Government suggests that the license "may also be viewed as a franchise." *Id.*

Although the Government jumps nimbly from one theory to another, its effective-sale, patent, essentially-in-business-with-the-licensee, and franchise theories are all seriously flawed. None suffices to show that the scheme charged was one to deprive the State of property.

A. The State Has No Property Interest in Video Poker Licenses Before They Are Issued.

1. The Government contends that the State "expects" to collect revenues – in the form of application fees and a percentage of future net revenues – from a licensee, "projects its anticipated revenue" based on that expectation, and therefore somehow has a property interest in a video poker license before issuance. *Id.* 32-33. Yet the Government never identifies exactly what interest of the State purportedly constitutes property. It says that a "property interest" exists, but it never describes what that interest is. Certainly a governmental entity's expectations and projections of revenue do not themselves create property rights, and the Government cites no authority to the contrary. Notably, the Government does not embrace the Fifth Circuit's description of the purported right, namely, "Louisiana's right to choose the persons to whom it issues video poker licenses." *Salvatore*, 110 F.3d at 1140. The Government does not dispute that that is an aspect of the State's regulatory powers rather than a property right. *See*

Pet. Br. 16. But the Government is unable to offer any substitute description of any State interest in an unissued license that constitutes a property right.

Instead, the Government argues that the State, when it issues a license, "is effectively 'selling' the license to the applicant" in return for the application fee and the subsequent percentage of revenues. U.S. Br. 33. The Government goes on to assert that it would be "curious" to conclude that the State is not giving up property when it issues a license, given that the license applicant is giving up property (in the form of money) and is receiving property (the license). *Id.* It is not at all clear that an issued video poker license is property in the hands of the licensee. *See* Pet. Br. 29 & n.29; note 24, *infra*; *Guillot v. La. Gaming Control Bd.*, 761 So. 2d 561, 563 (La. Ct. App. 1999) ("A gaming permit [allowing an employee to work in a casino] is not a right of property, citizenship or otherwise."). But even assuming that an issued license is property of the licensee, it does not follow that the State is deprived of any of its property when it issues the license.

Under the Government's effective-sale theory, a State would part with property whenever it issues, upon payment of *any* fee, a license that is property in the licensee's hands. Yet the courts of appeals have overwhelmingly held, in cases involving a wide variety of licenses, that a State does not part with property in issuing a license, and the Government does not challenge the correctness of those decisions. *See* U.S. Br. 39-40. The Government's effective-sale theory does not afford any principled basis for treating video poker licenses in Louisiana differently from any license for which a fee is paid and which constitutes property in the hands of the licensee.

Moreover, this Court has rejected an effort – similar to the Government's effective-sale argument here – to characterize a sovereign act of the government as a purchase. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 594 (1997) (rejecting "the notion that whenever a State provides a discriminatory tax abatement it is 'purchasing' some service in its proprietary capacity"). As in *Camps Newfound/Owatonna, Inc.*, in which this Court stressed that the tax exemption at issue "sweeps to cover broad swathes of the

nonprofit sector," *id.* at 594, the breadth of Louisiana's video poker licensing scheme – which embraces thousands of locations, *see* p. 26, *infra* – indicates that video poker licensing is "action taken in the State's sovereign capacity rather than a proprietary decision." 520 U.S. at 594. As a general matter, a governmental body's issuance of a license or permit is a regulatory and not a proprietary act,[14] and here the regulatory nature of video poker licensing has been recognized by the Louisiana judiciary, *see* Pet. Br. 15; the Attorney General of Louisiana, *see id.* 16; the Louisiana legislature;[15] and the Louisiana Department of Public Safety and Corrections. *See* La. Admin. Code, tit. 55, § 2405(A)(7) (1992).[16]

2. Contrary to the Government's suggestion, U.S. Br. 33-34, the case law recognizing that a holder of an *issued* patent has a property right in the patent does not indicate that the State has a property right in an *unissued* video poker license. The Government argues that the State's power to prohibit

---

[14] *See, e.g., United States v. Schwartz*, 924 F.2d 410, 417 (2d Cir. 1991) (export licenses for ammunition); *Yellow Cab Co. v. City of Chicago*, 186 F.2d 946, 948-49 (7th Cir. 1951) (taxicab licenses); *Sahuque Realty Co. v. Employers Commercial Union Ins. Co. of Am.*, 327 So. 2d 563, 568 (La. App. 1976) (building permit); *see also Goodwill Adver. Co. v. State Liquor Auth.*, 244 N.Y.S.2d 322, 329 (N.Y. Sup. Ct. 1962) (Lawrence Cooke, J.) (state's revocation of licenses to sell beer did not involve a proprietary right of the state), *aff'd on the trial court op.*, 244 N.Y.S.2d 640 (N.Y. App. Div. 1963).

[15] *See* La. Rev. Stat. Ann. § 33:4862.6(A)(1) (West Supp. 1996) (current version at La. Rev. Stat. Ann. § 27:306(A)(1)) ("The state of Louisiana has a legitimate interest in providing strict regulation of all persons, practices, associations, and activities related to the operation of licensed establishments licensed to offer video draw poker devices . . . .").

[16] That the State is not acting in a proprietary capacity in issuing video poker licenses is confirmed by the fact that the licensing scheme was established by a legislative mandate. *See Ass'n of Mexican-American Educators v. California*, 195 F.3d 465, 484 (9th Cir. 1999) (fact that teachers' examination requirement "was mandated by the Legislature (rather than by an administrator responsible for managing the positions at issue)" constituted "evidence that the State is acting in its sovereign capacity rather than its proprietary capacity").

others from running video poker operations, and to run such operations itself, is similar to a patent holder's power to prevent others from using his invention. *Id.* 34. The Government's argument disregards the critical difference as to the source of those powers: Whereas a patent holder can prohibit others from using his invention because he owns the patent, the State has the power to regulate gambling, not because of any property right of the State, but because of the State's police power. *See Polk v. Edwards*, 626 So. 2d 1128, 1137 (La. 1993) ("Louisiana courts have consistently recognized that the legislature's authority to regulate gambling constitutes a legitimate exercise of police power").

The Government also compares the State's financial exploitation of its authority over video poker through licensing to a patent holder's financial exploitation of his patent through licensing, and then concludes: "In both cases, the power to license others to participate in a particular economic activity, which they could not engage in absent the license, *furthers economic interests that qualify as property*." U.S. Br. 34-35 (emphasis added). The Government's argument is specious. It is not the patent holder's ability financially to exploit his patent that makes the patent property. *See College Sav. Bank v. Fl. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) ("business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense" (emphasis in original)). A patent is property whether or not anyone will pay for the right to use the invention it covers. Accordingly, that the State can obtain revenue through video poker licenses does not at all indicate that an unissued video poker license is property.

The most pertinent decision involving a patent is not mentioned in the Government's brief. It is the Federal Circuit's decision holding that the Patent and Trademark Office is not deprived of property when it issues a patent.[17]

---

[17] *See Semiconductor Energy Lab. Co. v. Samsung Elecs. Co.*, 204 F.3d 1368, 1380 (Fed. Cir. 2000), *petitions for cert. filed*, 69 U.S.L.W. 3110 (July 21 and 25, 2000) (Nos. 00-127, 00-138).

B. The State Has No Property Interest in the Licenses After They Are Issued.

The Government's alternative contention that the State had a property right in Truck Stop Gaming's license once it had been issued, U.S. Br. 35, raises an issue (i) that is not fairly included in the question on which certiorari was granted, which concerns whether the State is deprived of property when it issues a license, *see* page 1, *supra*; (ii) that was not raised in the Government's opposition to certiorari; and (iii) that was not raised or decided below. Under the authorities set forth in Part I, *supra*, the Government's new claim should not be addressed.

In any event, the Government's claim is without merit. To begin with, it does not fit the facts. The mail fraud charges were based on the license applications and accompanying affidavits, not any alleged misrepresentations during the one-year term of a license for the purpose of keeping that license for the rest of the year. *See* U.S. Br. 2a.

The Government's claim would fail even if it did fit the facts. According to the Government, the State has a property right in an issued license because the State is "essentially in business with the licensee," *id.* 35, and the State "protects its interest in the business through extensive regulation and monitoring," *id.* 35, and through retention of "control over whether, and in what circumstances, the license could be retained, revoked, transferred, or renewed." *Id.* 37. That argument is based on an incorrect premise and on features of Louisiana's video poker licensing scheme that most licensing schemes possess. It also confuses an interest in receiving revenue with a property right.

1. The Government finds a State property right in issued licenses because "The State prohibits the transfer of a video poker license to another person *except in limited circumstances with the approval of the State.*" U.S. Br. 31 (emphasis added); *see also id.* 32 ("The State controls . . . whether the license may be transferred . . . ."), 37 (after issuance of Truck Stop Gaming's license, "the State . . . retained control over whether, and in what circumstances, the license could be . . . transferred"). The Government relies upon the alternative

holding in *United States v. Bucuvalas*, 970 F.2d 937 (1st Cir. 1992), that the defendants there had deprived Massachusetts of a property right by transferring alcoholic beverage and entertainment licenses to straw owners. *Id.* at 939, 945. The Government's arguments fails for two independent reasons.

First, contrary to the government's assertion, the Louisiana video poker statute does not give the State "control" over the transfer of video poker licenses, U.S. Br. 32, 37, or provide for the transfer of licenses "in limited circumstances with the approval of the State." *Id.* 31. Rather, the statute flatly prohibits the transfer of a video poker license: "Any license issued pursuant to the provisions of this Part shall be personal to the licensee to whom it was issued and shall not be transferable." La. Rev. Stat. Ann. § 33:4862.11(G) (West Supp. 1996) (current version at La. Rev. Stat. Ann. § 27:311(G)). Indeed, the Government acknowledged in the District Court that video poker licenses are not transferable. R. 618. Because the statute requires persons holding more than a five percent ownership interest in a licensed entity to meet suitability requirements, *see* La. Rev. Stat. Ann. § 33:4862.11(D) (West Supp. 1996) (current version at La. Rev. Stat. Ann. § 27:311(D)), the transfer of such an interest allows the State to determine the suitability of the new owner pursuant to the State's regulatory powers. But because video poker licenses themselves are not transferable, the Government's new theory that the State's control over license transfers gives the State a property right is fallacious.

The Government cites La. Rev. Stat. Ann. § 27:306(D)(2) (formerly La. Rev. Stat. Ann. § 33:4862.6(D)(2) (West Supp. 1996)) to support its transfer argument. U.S. Br. 31, 36 n.19. That provision, however, does not permit the transfer of a license to another person. It applies when "the lease of a truck stop facility, which is a licensed establishment for the operation of video draw poker devices, expires or is terminated without legal cause by the lessor." La. Rev. Stat. Ann. § 27:306(D)(1). In that situation, § 27:306(D)(2)(b) merely permits the former lessee/licensee to "transfer the existing license to any other new or existing truck stop facility which meets all of the qualifying requirements contained in this

Chapter," without being "required to wait before making application and commencing video draw poker operation at a new or existing facility." Section 27:306(D)(2)(b) contemplates, not the transfer of a license to another person, but the former lessee/licensee's continued use of its own license at another truck stop without waiting to apply for a new license. No alienation of the license is involved.[18] Thus, whereas the licenses in *Bucuvalas* were transferable to third parties with the approval of the licensing authorities,[19] the video poker licenses here were not transferable.

Second, the jury instructions did not require the jury to find (nor did the evidence show) that Truck Stop Gaming's licenses had been transferred. *See* U.S. Br. 5a-7a. Even if video poker licenses in Louisiana were transferable (which they are not), the absence of an instruction requiring such a finding would make the Government's transfer theory an invalid basis for sustaining petitioner's conviction. *See McNally v. United States*, 483 U.S. 350, 360 (1987) (reversing conviction because "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property"); *see also Griffin v. United States*, 502 U.S. 46, 58-60 (1991); *Pierce v. United States*, 314 U.S. 306, 309-10 (1941).[20]

---

[18] Similarly, La. Rev. Stat. Ann. § 27:306(E), cited at U.S. Br. 36 n.19, merely provides that when a licensed establishment requiring an alcoholic and beverage license as a condition of receiving a video poker license is sold, the video gaming devices can continue to be operated during the pendency of the purchaser's applications for a new alcoholic and beverage license and video poker license. No transfer of the seller's license is permitted.

[19] *See* Mass. Gen Laws Ann. ch. 138, § 23 (West 1991) ("Any license under this chapter held by an individual, partnership or corporation may be transferred to any individual, partnership or corporation qualified to receive such a license in the first instance, if, in the opinion of the licensing authorities, such a transfer is in the public interest.").

[20] Although the Government dwells on the fact that Truck Stop Gaming's licenses were renewed, U.S. Br. 35, 37, under the Louisiana licensing scheme each video poker license automatically expires at midnight on June 30 of each year. *See* La. Admin. Code tit. 55, § 2405(A)(6) (1992).

2. Although the Government also notes that the State "retained control over whether, and in what circumstances, the license could be retained, revoked, . . . or renewed," U.S. Br. 37, it is typical for licensing authorities to have the power to suspend a license, revoke a license, and deny the renewal of a license. Such powers are inherent in most licensing schemes and in no way indicate that a State parts with property in issuing or renewing a license.

3. All that remains of the Government's contention as to issued licenses is its characterization of the State as "essentially in business with the licensee," and its emphasis on the "extensive regulation and monitoring of the licensed activity." U.S. Br. 35. Neither of those points suggests that the State holds a property right in each of the thousands of video poker licenses it has issued.

As to the former, a governmental entity's interest in receiving revenue from a regulated activity has never been regarded as a property right – as evidenced by the Government's failure to cite a single supporting authority. The Government's equation of "an ongoing economic stake" with a property right, U.S. Br. 35, would produce absurd results. Most States levy a sales tax based on a percentage of gross sales. For many lines of business in which sales tax is collected, *e.g.*, restaurants and bars, a state license is required. Under the Government's reasoning, the State would hold a property right in each restaurant license and liquor license. That is plainly not the law. Even from the licensee's perspective, the licensed activity of running video poker operations is not itself property. *See College Sav. Bank*, 527 U.S. at 675 ("business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense") (emphasis in original). *A fortiori*, the activity of running video poker operations is not the State's property.

As to the State's point about "extensive regulation and monitoring," U.S. Br. 35, that is a common feature of licensing schemes. That some licensing schemes call for close regu-

lation and monitoring has never been regarded as giving the licensing authorities a property right in issued licenses.[21]

C. Video Poker Licenses Are Not Comparable to Cable Television Franchises or Other Government Franchises.

The Government's alternative suggestion that a video poker license "may also be viewed as a franchise," U.S. Br. 37, similarly fails to show that the State was deprived of property.

1. A video poker license in Louisiana has the characteristics of a license and not a franchise. In general, a license is a mere privilege and except in rare instances is revocable.[22] In contrast, the grant of franchise, when accepted and acted upon, creates a contract and imposes binding obligations on both the grantor and the grantee.[23]

A video poker license is a privilege and is revocable. The Louisiana legislature has declared that a video poker license is "a pure and absolute privilege, the awarding, denial, or withdrawal of which is solely within the discretion of the division and, except as provided in this Part, without recourse at law." La. Rev. Stat. Ann. § 33:4862.1(D) (West Supp. 1996) (current version at La. Rev. Stat. Ann. § 27:301(D)). There is nothing to suggest that a video poker license creates a con-

---

[21] *Cf. United States v. Kristofik*, 847 F.2d 1295, 1296-97 (7th Cir. 1988) (holding that misapplication of proceeds of loan from SBA was not conversion of government property; "As a matter of basic principles, loan proceeds do not remain the property of the lender. . . . Although the level of oversight by the SBA in the transaction before us is perhaps unusually detailed and pervasive, the degree of oversight does not change the fundamental nature of the transaction or create a governmental property interest in the loan proceeds." (citation omitted)).

[22] *See, e.g., Dunmar Inv. Co. v. N. Natural Gas Co.*, 185 Neb. 400, 403-04, 176 N.W.2d 4, 6-7 (1970); *White Top Cab Co. v. City of Houston*, 440 S.W.2d 732, 734-35 (Tex. Civ. App 1969, no writ); *Shaw v. City of Asheville*, 269 N.C. 90, 97, 152 S.E.2d 139, 145 (1967).

[23] *See, e.g., United States v. Slay*, 717 F. Supp. 689, 693 (E.D. Mo. 1989); *Dunmar Inv. Co.*, 185 Neb. at 403, 176 N.W.2d at 6.

tract or that it imposes any obligations on the State. It is therefore properly categorized as a license and not a franchise.[24]

2. More importantly, the Government's franchise cases do not include a single decision holding that a governmental entity parts with property upon issuing something – regardless of what label is applied to it – that resembles a video poker license in Louisiana. None of the decisions of this Court cited by the Government suggest that a franchising authority relinquishes property when it grants a franchise. And the divided decision in *Borre v. United States*, 940 F.2d 215 (7th Cir. 1991), involved a franchise different in critical respects from the license here.

Borre held that a scheme "to obtain the Village of Fox Lake cable television franchise contract," *id.* at 219 (quoting indictment), was a scheme to defraud the Village of property. *Id.* at 219-22. If it were necessary to decide the question, there would be good reason to conclude that Judge Easterbrook, who dissented on this issue, *see id.* at 224-26, was correct and that Judge Wood and Senior District Judge Grant were incorrect. As noted in *United States v. Slay*, 717 F. Supp. 689 (E.D. Mo. 1989), which held that an alleged scheme to obtain a cable television franchise was not one to defraud the city awarding the franchise of property, it is not apparent "how mere contemplation of an ongoing contractual relationship rises to a property right" of which the franchising authority is deprived when it grants the franchise. *Id.* at 693.[25] But even accepting *Borre*, the decision is of no force

---

[24] Stressing the broad power of government to suppress gambling, this Court has held that even a written agreement whereby a citizen was to acquire and operate a municipality's lottery was a "gratuity and license," which the State could revoke under its police power. *See Douglas v. Kentucky*, 168 U.S. 488, 502 (1897).

[25] In addition to citing *Borre*, the Government relies upon dicta in *United States v. Italiano*, 894 F.2d 1280, 1285 n.6 (11th Cir. 1990). U.S. Br. 38. In that case, however, the defendant did not dispute that the County of Hillsborough parted with property in granting a cable television franchise. *See* 894 F.2d at 1286.

here because video poker licenses in Louisiana are not similar to cable television franchises.

First, traditionally a cable television franchise effectively has been a monopoly.[26] In *Borre*, for example, the Village of Fox Lake apparently awarded only a single cable television franchise contract. *See* 940 F.2d at 219; *see also id.* at 225 (Easterbrook, J., concurring in part and dissenting in part) ("Franchises usually are exclusive, while licenses are not."). In contrast, the State of Louisiana has issued video poker licenses for thousands of locations. *See Louisiana Legislative Fiscal Office, State Gaming Revenue–Sources and Uses* 1 (Dec. 20, 1999). At each licensed truck stop no more than 50 machines are permitted. *See* La. Rev. Stat. Ann. § 33:4861.6(A)(4)(a) (West Supp. 1996) (current version at La. Rev. Stat. Ann. § 27:306(A)(4)(a)); La. Admin. Code tit. 55, § 2415(A)(1)(e)(i) (1992). Obviously, when only one or a very limited number of franchises is to be granted, upon granting a franchise the franchising authority's ability to award a franchise to someone else has been eliminated or restricted. Whether or not that result can be considered a deprivation of property, the State of Louisiana suffers no similar loss in issuing a video poker license, for the State remains free to issue licenses to an unlimited number of additional applicants.

Second, unlike video poker devices, "cables must be laid in public rights-of-way and easements." *Time Warner Entm't Co.*, 93 F.3d at 962. For that reason, the *Borre* court viewed "the affirmative creation and use of easements and rights of way" with respect to public property as "part and parcel of the cable television franchise." *Borre*, 940 F.2d at 221. When a municipality grants an easement or right-of-way, it plainly parts with property. In contrast, the issuance of a video poker license is not accompanied by the creation of any

---

[26] *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460, 1460 (1992) ("most cable television subscribers have no opportunity to select between competing cable systems"); *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 965-66 (D.C. Cir. 1996).

easement, right-of-way, or other property right that entails the relinquishment of property by the State.

D. The Limited Scope of Congress's Response to *McNally* Supports Reversal.

The Government does not dispute that, when Congress restored only a single intangible right to the mail and wire fraud statutes in 1988, Congress knew that *McNally* had been interpreted by lower courts to require setting aside convictions based on alleged deception in obtaining licenses. *See* Pet. Br. 39-40. The Government nevertheless dismisses the intent of the 1988 Congress as "irrelevant to any issue in this case." U.S. Br. 42. This Court has not taken so limited a view of the pertinence of a subsequent amendment. Where it has been shown that Congress was aware of an authoritative interpretation of the statute being amended, but Congress chose not to override that interpretation and instead amended the statute only in other respects, this Court has inferred congressional approval of the interpretation. *See, e.g., CFTC v. Schor*, 478 U.S. 833, 845-46 (1986) (where federal agency issued regulations interpreting statute, and Congress later amended statute but did not overrule agency's interpretation, Congress's inaction was "persuasive evidence that the [agency's] interpretation is the one intended by Congress" (internal quotation marks omitted)); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 781-83 (1985) (where Congress was aware of authoritative case interpreting statute, and amended statute to change the rule established by the case in one respect, the appropriate inference was that Congress accepted the rule in all other respects). A similar inference is warranted here.

* * * *

Under any traditional notion of property, the State of Louisiana no more parts with property when it issues a video poker license than a governmental entity parts with property when it issues a license to export firearms, a school bus operator's permit, a bingo permit, a taxicab driver's license, a city poker license, or any of the other licenses and permits the issuance of which has been held not to constitute a deprivation of property. *See* cases cited at Pet. Br. 19-22. The proposition that the Government urges this Court to embrace

– that a mail fraud charge can be brought whenever the State "retains a substantial economic stake in the licensed activity" (U.S. Br. 40) – bears no relationship to established concepts of property. If the Government's proposition were accepted, courts would have an impossible line-drawing problem. *Cf. United States v. Bailey*, 516 U.S. 137, 149 (1995) (rejecting proposed construction of statute in part because it would create such a problem). How much is "substantial"? What qualifies as an "economic stake"? Are doctors' licenses and nurses' licenses covered because of the public spending on health care? Are teachers' licenses covered because of public spending on education? Are hotel licenses covered in cities where room taxes are high? There would be no principled basis for answering such questions, because the Government's approach is not tethered to any accepted understanding of property.

The Government's failure to show a traditional usage of the term property that encompasses the issuance of licenses in general, or video poker licenses in particular, confirms that the decision below should be reversed. A federal criminal prosecution in which a citizen's liberty is at stake is not an appropriate vehicle for pursuing a novel theory of property.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in petitioner's opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

ROBERT B. BARNETT
PAUL MOGIN*
JOSEPH G. PETROSINELLI

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Attorneys for Petitioner
Carl W. Cleveland

*Counsel of Record

September 15, 2000

ADDENDUM

ADDENDUM

The *Report of the Commission To Revise and Codify the Criminal and Penal Laws of the United States*, S. Doc. No. 57-68, Part 2 (1901), states in pertinent part:

> Section 190, "Use of mails to promote frauds:" Section 5480. Revised Statutes, as amended by the act of March 2, 1889, contains the words "to be effected by either opening, or intending to open, correspondence or communication with any person, whether resident within or outside the United States, or by inciting such other person or any person to open communication with the person so devising or intending." It is obvious that these words are not necessary to establish the criminality of the act sought to be denounced or the jurisdiction of the United States over the same, and it further appears from the decision in United States v. Smith (45 Fed. Rep., 561) that they add an element to the proof necessary for conviction. They are accordingly omitted in the revision here submitted. The section is further amended by adding the words "or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed." The following words are omitted: "The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months, but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the Post-Office Establishment enters as an instrument into such fraudulent scheme and device."

Id. at XVII.